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IN THE

Supreme Court of the United States

October Term, 1949

No. 561

STANDARD COMMERCIAL TOBACCO COMPANY and
STANDARD COMMERCIAL STEAMSHIP CORP.,
Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and
UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, and Brief in Support Thereof.

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Petitioners,

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, and
UNITED STATES OF AMERICA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to Review a Judgment Affirming the Dismissal of the Complaints in Intervention of Petitioners by the United States District Court for the District of Columbia, and Brief in Support Thereof.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., both Delaware corporations, intervening plaintiffs in the United States District Court for the District of Columbia, and appellants in the United States Court of Appeals for the District of Columbia Circuit, respectfully pray that a writ of certiorari issue to review a judgment of the said United States Court of Appeals for the District of Columbia Circuit, entered in

this cause on June 13, 1949, affirming a judgment of the United States District Court for the District of Columbia dismissing the intervening complaints of petitioners.

OPINION AND JUDGMENT BELOW.

Neither the opinion of the United States District Court for the District of Columbia nor the opinion of the United States Court of Appeals for the District of Columbia Circuit is reported. They appear in the record.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was rendered June 13, 1949. A petition for rehearing was denied September 28, 1949. This Court has jurisdiction by virtue of the provisions of Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED.

The questions involved are:

1. Whether a breach of trust is a tort within the meaning of the Federal Tort Claims Act of 1946, 60 Stat. 842, 843, 844.

2. Whether the United States is liable as a trustee to see to the application of money and property of Germany and German nationals coming into its hands as trustee to the discharge of obligations of its trust.

3. Whether the United States, because of its sovereignty, is exempt from the established rules of law which impose the duties of trustees upon those who become possessed of property which in equity and good conscience belongs to others.

4. Scope of the liability of the United States as constructive trustee to apply property and money of Germany and German nationals coming into its possession and ownership to the performance of its expressly assumed obligation to enforce and collect for American nationals damages for their private war losses.

5. Extent of liability of United States for failure of its officers, agencies, and employees to perform their fiduciary duties.

6. Whether any moneys and properties of Germany and German nationals coming at any time into possession and ownership of the United States became impressed with a trust in favor of petitioners and others similarly situated.

7. Whether petitioners' intervening complaints state facts sufficient to entitle them to a trial on the merits.

REASONS FOR GRANTING WRIT.

1. This case is one of novel impression. On no prior occasion has this Court been called upon to decide whether a breach of trust is a tort within the meaning of the Federal Tort Claims Act.

2. Research indicates that there is no opinion of this Court containing a comprehensive and conclusive definition of a tort, similar to that of Judge Finch of the Court of Appeals of New York in *Rich* v. *New York Central Railroad*, 87 N. Y. 382.

3. Clarification and interpretation of the Federal Tort Claims Act of 1946 with respect to violations of official duties by Government officials are instantly needed.

4. A declaration by this Court of the scope and extent of the Federal Tort Claims Act of 1946, according to the intent and meaning of Congress is necessary and unavoidable.

5. An interpretation and clarification of the meaning of the provisions of the War Claims Act of 1928 (45 Stat. 254) must eventually come from this court, as long as over $100,000,000 is due to American nationals under the provisions of this act.

6. The decisions of the courts below limit and circumscribe the Federal Tort Claims Act, contrary to the opinion of this Court in the case of *Brooks* v. *United States,* decided May 16, 1949 (93 L. ed. 884, 885, Advance Sheets), where this Court said "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States."; and more recently in the *Insurance Companies* Cases, decided on December 12, 1949 (94 L. ed. 151).

STATEMENT OF THE CASE.

The complaint in intervention of Standard Commercial Tobacco Company alleges that the corporation is the holder of an award of the Mixed Claims Commission, United States and Germany, in the amount of $450,000.00, with interest at 5 per cent from November 11, 1918, on which there was due and owing as of October 22, 1941, on account of principal a balance of $146,220.99, and unpaid interest of $147,663.73, a total of $293,884.72, with further accruals of interest since that date.

The complaint in intervention of Standard Commercial Steamship Corp., alleges that the corporation is the holder of an award of the Mixed Claims Commission, United States and Germany, in the amount of $89,294.00, with interest at 5 per cent from November 11, 1918, on which there was due and owing as of October 20, 1941, on account of principal a balance of $7,921.02 and interest of $12,390.86, a total of $20,311.88, with further accruals of interest since that date.

Each of the intervening complaints alleges:

(1) That defendant Snyder is sued in his capacity as Secretary of the Treasury.

(2) The United States is sued pursuant to the provisions of the Federal Tort Claims Act of August 2, 1946 (60 Stat. 842, 843, 844).

(3) The United States entered into an agreement with Germany, approved June 5, 1930, under which Germany agreed to pay in full all awards of the Mixed Claims Commission, United States and Germany

(4) To secure the payment of said awards, Germany deposited with the Secretary of the Treasury gold bonds of the German government of the face and dollar value of more than $500,000,000, and agreed to discharge such bonds in semi-annual payments until the United States received an amount sufficient to pay in full all awards of the Mixed Claims Commission, United States and Germany.

(5) About 1931, without the knowledge, consent or approval of the intervening plaintiffs or any other award-holder of the Mixed Claims Commission, United States and Germany, the United States relieved the German Government of its agreement to make payments on the gold bonds referred to above, and no payments have since been made thereon by Germany.

(6) After enactment of the Settlement of War Claims Act of 1928 and execution of the Debt Funding Agreement, the Secretary of the Treasury, in carrying out the terms of the Settlement of War Claims Act, applied certain German enemy money and property then in possession of the Alien Property Custodian of the United States, which were intended for the benefit of these appellants and others similarly situated, to provide payments to German nationals formerly enemy aliens, and issued to the Alien

Property Custodian his certificate of indebtedness in the sum of $56,000,000, a copy of which certificate of indebtedness is appended to the complaints in intervention as Exhibit A.

(7) By the Harrison Resolution of June 27, 1934 (48 Stat. 1267), the Congress suspended and superseded the authority of the Secretary of the Treasury to make further payments to German nationals under the Settlement of War Claims Act.

(8) Since enactment of the Harrison Resolution there remained and then were in the custody and possession of the Secretary of the Treasury cash and securities in excess of $10,000,000 in special accounts, including the German Special Deposit Account, available for payment on awards of said Mixed Claims Commission, United States and Germany.

(9) As a result of war between the United States and Germany, declared December 7, 1941, the United States has become possessed of, owns, and now has large amounts of gold, currency, securities, and other properties derived from Germany and German Nationals in excess of $500,000,000.

(10) The United States has made no effort to apply any of the money or property of Germany and its nationals in its ownership and possession to the payment of the bonds of the German government mentioned above, which have been in default since 1931, or to apply any of such money or property to the payment of the certificate of indebtedness referred to above.

(11) Other than plaintiff, the intervening plaintiffs, and others similarly situated, no one else has or claims to have any right to any part of such money and property.

(12) Upon the United States becoming vested with money and property formerly belonging to Germany and German nationals, and having assumed a position of trust

for the benefit of petitioners and others similarly situated, such money and property became and still are impressed with a trust in favor of petitioners and others similarly situated.

(13) By virtue of the Settlement of War Claims Act, the United States claims no interest, except as trustee, in the German Special Deposit Account or the German gold bonds referred to or the proceeds thereof, because they were delivered to the defendants for the sole and exclusive benefit of holders of awards of the Mixed Claims Commission, United States and Germany.

(14) Following the declaration of war with Germany in 1941, it became and still is the duty of the United States to apply to the payment of the German gold bonds heretofore mentioned and in satisfaction of said certificate of indebtedness, property and money of Germany and German nationals, which came into possession and ownership of the United States in sufficient amounts to pay the balances due on the awards of petitioners and others similarly situated; and, since such money and property became and still are impressed with a trust in favor of appellants and others similarly situated, the failure of the appellees to so apply them constitutes a breach of trust and makes them guilty of a wrongful act and omission of duty within the meaning of the Federal Tort Claims Act, and tantamount to conversion, if attributable to private persons.

(15) As a result of the omission and neglect of duty by respondents, as aforesaid, petitioners and others similarly situated have been and are injured in their property rights and have suffered losses within the meaning of the Federal Tort Claims Act equal to the unpaid balances due on their awards of the Mixed Claims Commission, United States and Germany.

(16) On information and belief, petitioners allege that there are due on awards of the Mixed Claims Commission, United States and Germany, more than $110,000,000.

(17) Demand was made by the original plaintiff February 6, 1947, upon the respondents for payment of her award, and also a demand that respondent Snyder pay to the Alien Property Custodian or his successor, the amount due on his certificate above referred to, such payment to be made out of money and property of the German government and German nationals under his control or in his possession, but he has refused to honor such demand, and a like demand by petitioners would be futile, and the law does not require a useless act.

(18) All moneys in the German Special Deposit account and the aforesaid German gold bonds, by virtue of the treaty and agreement between the United States and Germany, were received in express trust for the benefit of petitioners and others similarly situated.

(19) Because there are funds and property in possession of the respondents or under their control for payment of the awards of petitioners and others similarly situated, it is the ministerial duty of respondent Snyder to make such payments.

Appropriate prayers for relief were included in each of the complaints in intervention.

The claims of petitioners arose out of losses sustained by them during World War I, and are adjudicated claims based on awards of the Mixed Claims Commission, United States and Germany.

Since the bringing of this proceeding, the Government has paid from the German Special Deposit Account the sum of about $11,000,000 on awards of the Mixed Claims Commission, United States and Germany, equivalent to about ten per cent of the amounts due on awards of said Commission, under the Act of August 6, 1947 (Public Law No. 375, 80th Congress).

Wherefore, petitioners pray the allowance of a writ of certiorari to the United States Court of Appeals for the

District of Columbia Circuit in this cause, there entitled *Katharine M. Drier, Standard Commercial Tobacco Company and Standard Commercial Steamship Corp., Appellants,* v. *John W. Snyder, Secretary of the Treasury, and United States of America, Appellees,* No. 9902; that said cause may be reviewed and determined in this Court; and that the judgment of the United States Court of Appeals for the District of Columbia Circuit may be reversed and set aside; and for such further relief and remedy in the premises as this Court may deem meet and proper.

STANDARD COMMERCIAL
TOBACCO COMPANY

By RICHARD L. MERRICK
Of Counsel for Petitioners

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the United States District Court for the District of Columbia is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet officially reported. It appears in the Record.

JURISDICTION.

The jurisdictional Statement contained in the Petition for Writ of Certiorari is adopted, and is not set forth herein.

QUESTIONS PRESENTED, ERRORS URGED, ETC.

The questions presented, reasons for granting the writ, and Statement of the Case are set forth in the foregoing petition, and the request is respectfully made that reference thereto be made and that they be considered as having been incorporated herein.

ARGUMENT.

By their motion to dismiss the complaints in intervention, the respondents, for the purposes of this appeal, admit the truth of all facts well pleaded. The trial court held (1) that the Federal Tort Claims Act does not apply to this case, either in terms or construction, and (2) that "any purported claim of liability is specifically negatived by the provisions of the War Claims Act of 1928 (45 Stat. 254)" which provides that "nothing in this section shall be construed as the assumption of liability by the United States for payment of the awards * * *". The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the trial Court. Both courts missed entirely the vital and controlling questions involved and the theory of these petitioners. There was no assump-

tion of liability by the United States under the War Claims Act of 1928 and none was contended for or urged by petitioners. No request was made by petitioners that the awards to them be paid out of money or property originally belonging to the United States, but only from money and property coming into its hands from Germany and German nationals, as to which the United States was a trustee only, with the obligation and duty to apply such property and money to the payment of all awards of the Mixed Claims Commission, United States and Germany.

There really is only one pertinent inquiry, namely; are sufficient facts alleged in the complaints in intervention to put defendants to proof.

An analysis of the complaints in intervention discloses that allegations of fact are set forth therein, showing that the acts complained of occurred and the money and property involved are within the jurisdiction of the trial court; that appellants are holders of awards of the Mixed Claims Commission, United States and Germany, on which substantial sums of money are long overdue and unpaid; that the United States, for and on behalf of petitioners and others similarly situated, entered into an agreement with Germany by which the latter was "to pay in full all awards" of the Mixed Claims Commission, United States and Germany, and by the Debt Funding Agreement of June 5, 1930, Germany agreed to pay all awards in full, and, to secure such payment, deposited with the Secretary of the Treasury gold bonds of the face value of more than a half billion dollars, at the same time agreeing to discharge the bonds in semi-annual payments until the full amount of the awards of the Mixed Claims Commission were paid in full.

Having pleaded the awards and agreements aforementioned, the complaints in intervention, in paragraph 8, allege that about 1931, the United States, without the knowledge, consent or approval of petitioners for whose benefit the agreements and awards were made, relieved Germany

of its agreement to make further payments on the bonds, and no payments since have been made thereon.

Those allegations clearly show the assumption by the United States of the performance of a duty to petitioners, the partial discharge thereof, and a violation of such duty by the United States, resulting in serious detriment to petitioners in the way of lost payments on their awards.

In Paragraph 9 of the complaints in intervention, a wrongful diversion of funds by the Secretary of the Treasury from petitioners to German nationals is clearly alleged, as well as the giving by the Secretary of the Treasury of a certificate of indebtedness in the amount of $56,000,000 therefor. A copy of the certificate is annexed to each of the complaints in intervention and should appear in the Record.

In paragraphs 10 and 11 of the complaints in intervention, allegations of fact are set forth showing that the Congress stopped the Secretary of the Treasury from making further payments to German nationals, and that the acts of the Secretary of the Treasury were wrongful. Those wrongful acts resulted in great detriment and loss to these appellants, and they ought to be able to recover therefor.

In paragraph 12 of the complaints in intervention facts are alleged showing that since December, 1941, the United States has become possessed of and has large amounts of gold, currency, securities, and other properties, which it seized from Germany, and German Nationals; and in paragraph 13 allegations are made that no effort has been made by the United States to apply any of such money or property to the liquidation of the German bonds still in its possession, which have been in default since 1931, or to apply any of such money and property to the liquidation of the certificates of indebtedness referred to above, despite the fact that there exists no rights or claims of right to such money and property except that of these petitioners and others similarly situated.

In paragraph 14 specific allegations are made that no one, other than petitioners and others similarly situated, has or claims to have any right to any part of said money and property.

In paragraph 15 allegations are made that the United States assumed a position of trust for the benefit of petitioners, and that the money and property in question became and still are impressed with a trust in favor of appellants.

These are all allegations of facts or ultimate facts in the way of factual conclusions, requiring the production of evidence on the part of the United States to meet or disprove them.

The pleading of ultimate facts and factual conclusions is proper. In fact, to plead in extenso evidentiary matters is wholly improper. A short and plain statement of the plaintiff's claim is all that is required.

Rule 8 (a)(2), Federal Rules of Civil Procedure.

FEDERAL TORT CLAIMS ACT APPLIES.

The allegations of the complaints in intervention clearly establish the existence of a duty on the part of the United States to collect the German bonds and apply the proceeds to the liquidation of the awards of the Mixed Claims Commission, United States and Germany. Under its agreement with Germany, the United States became a trustee, charged with a specific duty to hold the bonds, collect the payments thereon, and pay the collections to awardholders of the Commission.

The United States entered upon the performance of that trust, but violated it in 1931, by relieving the German government of the obligation to make further payments on the bonds. The complaints in intervention further show that the United States, as trustee, violated its duty and obligation to appellants, to their damage in the amounts of their unpaid awards.

In the cases of the *United States of America* v. *Aetna Casualty and Surety Company*, decided December 12, 1949, 94 L. ed. 151 Advance Sheets, this Court stated:

> "* * * the language of the Act indicates a congressional purpose that the United States be treated as if it were a private person in respect of torts committed by its employees, except for certain specific exceptions enumerated in the Act * * *", and
>
> "In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N. Y. 140, 147: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'"

In lieu of a more formal brief, we attach hereto a memorandum prepared by Harold G. Aron, Esquire, and ask that this Court consider the same a part hereof.

CONCLUSION.

We respectfully contend that the writ of certiorari for the review of the proceedings below should be granted and that this case should be heard and decided in this Court.

Respectfully submitted,

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October 4, 1949

MEMORANDUM to Mr. Merrick.

Re: Petition for Writ of Certiorari.

Point I. The case is one of novel impression; certainly on no prior occasion has the Supreme Court of the United States been called upon to decide that a *breach of trust* is a tort under the Federal Tort Claims Act of 1946.

Point II. To the best of counsel's knowledge, the Supreme Court has not had occasion to sanction the enforcement of its repeated opinions that the United States can be held to the responsibilities and duties of an express or constructive trustee.

Point III. The Supreme Court has yet, for the first time, since Chief Justice Marshall's opinion (1824) in *Bank of the United States* v. *Planters Bank of Georgia,* 9 Wheaton 904, 6 L. Ed. 244, (See also, as to Marshall's views, Senate Doc. 102, 19th Cong., 1st Sess., Vol. 5, pp. 470, 471), to pass on the question whether, because of its sovereignty, the United States is exempt from the established rules of law and equity which, *in invitum,* impose, *inter alia,* constructive trusts on those who become possessed, legally, rightfully, or wrongfully, of property which in equity and good conscience belongs to others.

Point IV. On the admitted facts (as this petition brings up a dismissal of the complaint on bare motion, without denial of the facts or the introduction of any testimony, evidence or proof) the decision below is in direct conflict with the recent decision of the Supreme Court in *Brooks v. United States,* decided May 16, 1949. The appeal herein was argued below on April 15 and decided June 13, 1949, before the Brooks decision was officially reported. The opinion of the Supreme Court in the Brooks case supported the learned dissenting opinion of Judge Parker in the Circuit Court of Appeals, Fourth Circuit, 169 Fed. 2d, 848, where it was pointed out that "where express exceptions are made, the legal presumption is that the legis-

lature did not intend to save other cases from the operation of the statute." This case falls within none of the many exceptions enumerated in the Federal Tort Claims Act, but the courts below have in this, as in other respects, disregarded all rules of statutory construction, without a word of explanation for their action.

Point V. Since 1875, there has been no decision of the Supreme Court as to the extent of the liability of the United States under express and implied trusts assumed by it or imposed upon it by operation of law. Vast have been the changes during that interval in the political and economic concepts and relations of the government and its citizens.

Point VI. Since the decision in *DeBode* v. *The Queen*, 3 Clarke's House of Lords, 464 (1751), cited by the Court of Claims in the Gray case, (21 Ct. Clms., 340; See also 22 Ct. Clms. 724), there has been much written in judicial opinions that is conflicting and confused as to the relation of the sovereign in the prosecution of private war losses resulting to its citizens and nationals—going the whole way from the academic discussion contained in the government's brief below seeking to show that "the state has full discretion to determine whether or not it will press any claim against State A" to the firmer statement of sound principles in the DeBode case, where Lord Truro said: "It is the admitted law that * * * if the subject of a country is spoliated by a foreign Government, he is entitled to redress through the means of his own Government. But if from weakness, timidity, or any cause on the part of his own Government no redress is obtained from the foreign power, then he has a claim against his own country." There are amazing similarities and most trenchant dicta in the DeBode case, decided by the House of Lords in 1751, reported in the Reprint, Vol. 10, at page 176. A reading of that report, the language of the Lord Chancellor and the arguments of counsel and the Crown's attorney general, more than underline our assertions that

this, too, is an historic case and should not be waved aside without opinion on a motion to dismiss. In the DeBode case, there will be found this argument of counsel for the appellant: "A subject of the realm may become entitled to sue the Crown for compensation on a convention * * *. This is a convention of indemnity (to indemnify by the French Government British Nationals who have suffered injuries in the French Revolution). If the indemnity has been made by the Crown less than it ought to be, then the subject has, on petition of right, a claim on the Crown to supply the deficiency. The case of the *Merchants of England* v. *The Earl of Flanders* (1 Vol. Rotuli Parliamentorium, 18th Ed., p. 61) is an authority on both these points." In the language of the Lord Chancellor will be found these words. "The Crown can not do acts which are against natural equity without the law affording some remedy." And, it will be found that in dismissing the appeal upon the ground that the appellant had not complied with the applicable statute in establishing his claim, the Lord Chancellor observed: "The only action he could maintain would be an action of *tort* and *tort* is not maintainable against the crown." Thus is highlighted the soundness of this plaintiff's case, in view of the enactment of the Federal Tort Claims Act and its significance which the courts below spurned.

This case presents the opportunity for the Supreme Court to clarify the present law on this point which should, in the public interest and for the development of a sound international law, be availed of. For purposes of clarity as to our position, we are prepared to stand on whatever view the court may take of the issue; if it be held that no duty rests upon the United States to prosecute private war losses and no liability exists on the United States for their payment, our thesis is not shaken: we stand on the position, supported by earlier decisions of this court for a century and a half, that when the United States does elect to prosecute private war losses and does

collect thereon, even though it be but a sovereign act of grace, the proceeds in its treasury must go to the citizens and nationals who suffered those losses and are impressed with a trust therefor, where there exists as here no paramount claim of equity. (*United States* v. *Cooper,* 120 U. S. 124, 26 L. Ed. 721, 723 (1887); *United States* v. *Taylor,* 104 U. S. 216; 26 L. Ed. 721 (1881); *United States* v. *Wardwell,* 172 U. S. 48, 43 L. Ed. 360 (1898); *Burnell* v. *United States,* 44 Ct. Cls. 535)

Point VII. There does not exist in any opinion of the Supreme Court, of which we know, a modern, comprehensive and conclusive definition of the word "tort" to parallel that of the distinguished Judge Finch of the Court of Appeals of New York in *Rich* v. *New York Central Railroad* (87 N. Y. 382), quoted in part below:

> "We have been unable to find any accurate or perfect definition of a tort. Between actions ex contractu and those clearly ex delicto, there exists what has been termed a borderland, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly co-incident as to make their practical separation somewhat difficult. * * * And, yet, it is conceded that a tort may grow out of, or make part of, or be co-incident with a contract and that precisely the same state of facts, between the same parties, may admit of an action ex contractu or ex delicto. Obviously the essence of a tort consists in a violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, generally separable from the breach of contract. * * * It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's

> argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation but upon the original moral duty enjoined upon every person to conduct himself in exercise of his own rights as not to injure another. Whatever its origin, such legal duty is uniformly recognized and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in human society. It is then doubtless true that a mere contract obligation may establish no relation out of which separate and specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty and its omission a wrong to be redressed. The duty and the *tort* grow out of the entire range of facts of which the breach of contract is but one. The whole doctrine is accurately and concisely stated in 1 Chitty Pleading 135, that 'if a common law duty result from the facts, the party may sue in tort for any negligence and malfeasance in the execution of the contract' ".

Without some conclusive definition of the word "tort" by the Supreme Court, the Federal Tort Claims Act, by its very nomenclature, will lead to endless controversy. For example, the rights of the parties here petitioning can not be determined until the Supreme Court says with final authority, with which it alone is vested, whether it concurs in the general view of lesser tribunals and all text book writers and encyclopaedists that the breach of an express or implied trust is a tort, as that word has been defined for centuries in the common and civil law, and as it is used *not in* (for the word does not occur in the act itself) but in the citation title of the Federal Tort Claims Act. In this connection there remains the corollary question whether

the language of the Act itself is not so broad, and intentionally so, that it includes every conceivable type of wrongdoing resulting in injury to person or property, and was so intended, which appears to be the view of the Supreme Court in the recent decision in the *Brooks* case.

Point VIII. To let this case be forever embalmed upon the unreported and vacuous opinions of the courts below will be a tragedy of the law, because of the historic change it negates, through judicial amendment and interstitial legislation by the judicial branch of the Government, in throwing us back to the doctrine sponsored by King James three hundred and forty-six years ago that "The King can do no wrong."

Since the filing of the complaint herein, two Congresses have convened and had adequate opportunity to amend the Federal Tort Claims Act, if our interpretation of that law is incorrect and not in accord with what the Congress meant. Being advised of this action, it was the duty of the Attorney General to call this litigation to the attention of the Congress, if there is any sincerity in his contention that our construction is wrong. Neither he nor any court in the land has the right to substitute his or its judgment for that of the Congress or to usurp its power by amendment of the law by his or its opinions.

Point IX. As the case comes to the Supreme Court on petition for certiorari, the record shows:

(1) The government moved to dismiss upon the general ground that the complaint failed to state a cause of action upon which relief may be granted; that there was a misjoinder of parties defendant, and that the complaint shows on its face that the action is barred by the Statute of Limitations. No reference was made to any of these grounds in the decision of the courts below.

(2) The District Court (McGuire, J.) dismissed the complaint apparently on the ground of Sec. 4(h) of the Settlement of War Claims Act of 1928 (45 Stat. 254)—a point not raised or argued before him and

totally and palpably of no relevancy, since no such contention had been made by the plaintiffs and it in no way affected their case that the United States had disclaimed liability for the payment of awards under the Act. Their case rested on the liability, unaided by statute, under the centuries old laws of trust; and at law, by statute, under the Federal Tort Claims Act.

(3) The Court of Appeals based its *per curiam* (Bennett, Proctor, and Lederle, JJ) on a *close examination* "of the available record" and found "no error in it to justify reversal." The court persisted in this view after a petition for rehearing and six months consideration of the case. The only record, the whole record, if such may be called a record, consisted of a complaint of six printed pages. There was no testimony and not a single exhibit; no trial or hearing, except on the motion to dismiss. What record the Court of Appeals closely examined to us seems metaphysical.

Point X. In this utterly unprecedented case, involving over one hundred million dollars awarded to American citizens and nationals from ten to thirty years ago for private war losses suffered and proved by them, and still unpaid, neither court below has seen fit even to mention, much less allude to a single authority cited in the plaintiff's brief, as follows:

United States v. *Taylor,* 104 U. S. 216, 26 L. ed. 721, 723 (1881)
United States v. *Cooper,* 120 U. S. 124, 30 L. ed. 606 (1887)
United States v. *Wardwell,* 172 U. S. 48, 43 L. ed. 360 (1898)
Burnell v. *United States,* 44 Ct. Cls. 535
Williams v. *Heard,* 140 U. S. 528, 35 L. ed. 550, 555, 556 (1891)
LeCrone v. *McAdoo,* 253 U. S. 217, 64 L. ed. 869 (1920)
Comegys v. *Vasse,* 1 Pet. (U. S.) 193, 7 L. ed. 108 (1828)
54 Am. Jur. 105, Sec. 119
Frelinghuysen v. *Key,* 110 U. S. 63, 28 L. ed. 71 (1884)
Bank of United States v. *Planters Bank of Georgia,* 9 Wheat. 904, 6 L. ed. 244, 245 (1825)

Chesapeake and Delaware Canal Co. v. *United States,* 250 U. S. 123, 63 L. ed. 889, 892 (1919)
Van Brocklin v. *Tennessee,* 117 U. S. 151, 29 L. ed. 845, 847, 6 S. Ct. 670 (1886)
United States v. *Insley,* 130 U. S. 263, 32 L. ed. 968, 969, 9 S. Ct. 845 (1889)
United States v. *O'Grady's Executors,* 23 Wall. 641, 22 L. ed. 772 (1875)
United States v. *Klein,* 13 Wall. 128, 60 U. S. 519, 20 L. ed. 519 (1872)
United States v. *Padelford,* 9 Wall. 531, 19 L. ed. 789, 792 (1870)
Senate Report No. 1400, 79th Cong., on S. 2177, which included the Tort Claims Act.

Point XI. In our motion for rehearing in the Court of Appeals, we said, though it fell upon deaf ears, what we here repeat:

The provisions of the Tort Claims Act were discussed in the briefs of appellants. The applicability of such provisions to an action of this kind, particularly in view of the actions of the Secretary of the Treasury, was urged and explained. Counsel for appellants gave much thought and consideration to that question, and, whether right or wrong, they were of the opinion that a proper interpretation and construction of the statute, particularly in view of its remedial nature, would include an action of the nature of that set forth in the complaints herein.

Counsel for appellants hoped for the sound advice and wise judgment of this Court upon that question also, and the failure to receive them is quite disappointing.

Counsel are bewildered and somewhat baffled by the language of the opinion of this Court that "The Court has closely examined the available record and finds no error in it to justify reversal." The "available record" constitutes all pleadings, motions, orders, memoranda, and pertinent papers filed in the court below. There is nothing else available, so far as known to counsel, except the Clerk's docket entries in the court below. The only docu-

ments of importance before the Court, however, were the complaints, all of which were substantially the same. It seems unusual to denominate a complaint as a record, when tested by a motion to dismiss. Of course, the opinion of the trial court sustaining the motion to dismiss constitutes a part of the record, but if the complaint states a cause of action, then the lower court clearly was in error in dismissing it. Since, as demonstrated above, the lower court entirely misconceived the true theory of the trust fund doctrine invoked by appellants, the record discloses "error in it to justify reversal." If not deemed sufficient to justify reversal, such error seems sufficiently important to warrant full discussion and demonstration of how and why these appellants are not entitled to a trial on the merits and their day in court on complaints clearly adequate in allegations to create justiciable issues if denied, and clearly sufficient when admitted by motion to dismiss to form the basis for a judgment in favor of appellants.

However, whatever difficulties are presented by the language of this Court's decision in virtually foreclosing intelligent presentation of grounds for reargument or preparation of a petition for writ of certiorari without wandering over the entire field of possible grounds forming the basis of the decision, happily subsequent events, which this Court properly may and should judicially notice, present, in the view of appellants, a compelling and unanswerable ground for rehearing. This appeal was argued April 15, 1949, and decided on June 13, 1949. On May 24, 1949, the President approved Public Law No. 71 of the present 81st Congress, which, among other things, provided for the payment of the expenses of the War Claims Commission, which was established by Public Law No. 896, 80th Congress. That Commission is solely an administrative agency of the United States, differing from the previous claims commission only in the task assigned by the terms of the act from the Bureau of Internal Revenue. This agency is to be supported exclusively out of money and property

seized from Germany and German nationals. Thus, while this Court was considering this case, the Congress of the United States, with the approval of the President, perfected the appellants' case by legislative action which did not and could not appear "in the available record." The United States, we maintain, has now actually and undeniably converted a trust fund held by it for the appellants under recognized rules of law and equity and has taken out of such trust fund money to pay its own expenses.

Appellants' case rests primarily upon two grounds: (1) That historically and from the beginning of the Republic, the United States, *quoad hoc*, by its own courts had been held to the performance of its duties as trustees, where its own declarations, conduct or events had placed upon it the responsibility of trustee toward its citizens or any group or class thereof. This point is fully demonstrated and sustained by the authorities cited in appellants' briefs. (2) The specific assumption of liability by the United States in the Federal Tort Claims Act. This point is fully discussed in the briefs of appellants.

From the cryptic decision of this Court what conclusions are lawyers, courts and litigants to draw if that decision should be the last judicial word in this case. The following questions occur to appellants: (a) Under no circumstances has the United States any liability to deal justly, meet its fiduciary obligations, and to do that which is *ex sequo et bone*. (b) Is not the United States, like a citizen, subject to penalty and punishment when it converts money and property impressed with a trust in favor of certain of its citizens. (c) Does not the Federal Tort Claims Act apply, and if not, why? On this point the future researcher, using the decision in this case, may build a brief that will completely frustrate the intent of Congress in enacting the Federal Tort Claims Act, if the facts pleaded by appellants are not a wrong within its terms. (d) Does this Court disagree with other courts and the scholarly definition of Judge Finch by excluding the violation of a trust

duty from the meaning of the Tort Claims Act? (e) Is not the decision of the trial court and its affirmance by this Court an amendment of the Tort Claims Act which clearly provides that the United States shall be liable for any wrong if a private citizen in like circumstances would be liable, and would not that be judicial legislation? (f) Does not the situation in this case nullify an expressed policy of the Congress, as shown by the Senate Report on S. 2177, 79th Congress, and thus constitute a "writing off" of a half century of legislation consistent with that policy? (g) No ground for the dismissal of the complaints in this case has been enunciated. The trial court said the Tort Claims Act did not apply, and then misconceived the trust fund theory. Determination of the reasons for dismissal is left to conjecture. Affirmance without the statement of grounds or reasons therefor only confuses appellants. They desire the exercise of this Court's wisdom and experience in deciding and explaining what, to them, after months of deliberations and consideration, they deem valuable rights. Summary denial of these rights without any explanation or reasoning tends to shatter their conception of that treatment they have always believed they were entitled to receive.

Point XII. In addition to the difficulties of counsel thus recited, there baffles them the question, why, by the nature of the proceedings, it is factually admitted that the United States holds funds collected for this plaintiff and others similarly situated, any court can deny the plaintiff the right to present the cause in any tribunal of the United States. There is no denial, necessarily, so, on a motion to dismiss, of what seems to us purely factual allegations and the inferences to be drawn therefrom (as distinguished from conclusions of law) set forth in the complaint as follows:

> Par. 9. "the Secretary of the Treasury applied certain monies and properties, then in the possession of the Alien Property Custodian of the United States and intended for the benefit of this plaintiff to other payments," etc.

Par. 13. "the defendant United States of America, has made no effort to apply any of the monies and properties", etc.

Par. 15. "such properties and monies—became and still are impressed with a trust in favor of the plaintiff", etc.

Par. 16. "By virtue of the Settlement of War Claims Act, the defendant, United States of America had and claimed to have no interest except as trustee."

Par. 14. "No individual, firm, corporation or national of the United States, or of any other country has or claims to have any right to any part of the monies and properties referred to above and now in the custody and possession of the defendants."

Par. 21. "all monies in the German Special Deposit Account and the German bonds aforesaid were, by virtue of the treaty and agreement between the United States and Germany, received in express trust for the benefit of the plaintiff."

None of these allegations is denied and they seem to us clear allegations of fact. Having avoided, as required by good pleading, the pleading of evidence, it is difficult to see by what reasoning and authority the plaintiff is barred from presenting its evidence.

Point XIII. If this action in the present state of the proceeding passes into the archives of juridical precedent, there will have transpired one of those amazing incidents in jurisprudence, similar to that which frustrated the Statute of Uses four hundred years ago. As this court has observed in the Brooks Case, there were eighteen tort claims bills introduced in the Congress in the decade between 1925 and 1935. When in 1946, the Congress acted because, in the Senate Committee's words (see Report No. 1400), the doctrine that "the King can do no wrong" only was the only justification "seems historical", in keeping the words of the Chancellor of England that the doctrine is "a survival that should be swept away", it is fair to assume that the Congress was well aware that it moved Anglo-Saxon justice forward three hundred and fifty years

and held sovereignty for the first time in history to the moral responsibilities enforced against its citizens and nationals. We plead with this Court to hear this cause, lest the monstrous thing happen that the Federal Tort Claims Act be construed to exempt and license acts of the Sovereign in the betrayal of trust and confidence which from time immemorial have "shocked the Chancellor's foot." If such is the meaning of the Federal Tort Claims Act, it "blacks out" what great justices of this court since the days of Marshall have said as to the responsibilities of the United States in such trust relationships. Certainly if this is to be the construction placed on the Federal Tort Claims Act, no lesser court than this tribunal should take the responsibility of decreeing it, for then as in the scriptural parable "the last state is worse than the first."

Point XIV. As this record stands, and unless this Court intervenes, the decisions below, if they escape oblivion, will sum up to a new doctrine to replace that of King James and going far beyond the maxim that the "King can do no wrong." That new doctrine will be this: *"No rule of law, equity or conscience binds the sovereign and no trust can be enforced against him."* In short, the "keeper of the King's conscience will be *functus officio*".

Point XV. We are, and from the beginning of this litigation, have been well aware of the enormous difficulty of seeking a massive judgment against the United States of America in Federal Courts guarded by Federal officials and employees. We are likewise alert to the observation of a long experienced and eminent practitioner that "No debtor is more unscrupulous than the Government and no creditor more cruel, that no plaintiff is more ruthless and no debtor more evasive." If such obstacle exists, we can only point out that this plaintiff is not seeking to deplete the Treasury of the United States or to take judgment against its assets. The recovery sought will come out of or be fully compensated by the proceeds now in special

accounts in the United States Treasury, resulting from the seizure and divestment of enemy assets in time of war. (Public Law 806, 80th Cong., Chapter 826, 2nd Sess.)

Point XVI. Were the position of the parties reversed and had the decisions below gone against the Government, it is safe to assume that its law officers would be here pleading for a writ, sounding the same *ad horrorem* note which they sounded in the Brooks Case when it was before this Court. Naturally, the far reaching importance of the implications of the decision to the Government as distinguished from the citizenry.

Point XVII. Nowhere in the courts below does any consideration appear to have been given to the Certificate of Indebtedness issued by the Secretary of the Treasury and the legal implications to be drawn from the fact, as we are informed, that this conforms to the established practice in dealing with "trust funds" as in the case of Social Security Taxes. Under Section 25 of the Trading with the Enemy Act, as amended, enemy property instantly upon seizure passes under a trust by the language of the section. Such was its status when this action was begun. Subsequent action by the United States could not alter the rights of these plaintiffs and does underline the tortious wrong done them in not applying these enemy assets to their awards against Germany, as they were the only persons having a legal or equitable claim thereon.

H. G. A.